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No. 1031

In the Supreme Court of the United States

OCTOBER TERM, 1968

MARVIN J. MORSE,
Petitioners,

vs.

D. A. HINDMAN, et al,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and to the Supreme Court of the State of Kansas

Petition

MARVIN JAMES MORSE
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No. .....

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Petition

The pro se petitioner, Marvin J. Morse, prays the Supreme Court grant writs of Certiorari to review:[1]

1. The additional respondents hereinafter mentioned in this petition for certiorari and against whom petitioner is asserting adverse claims to real property are: Pauline Hindman; Charley A. Lynd; Elida Lynd; Tomlinson-Kathol, Inc.; William T. Kemper; Ray H. Quackenbush; Eugene Crabtree; Frank E. Hedrick; Theodore Carter; Jim Donham; E. Davis Hickman; Jessie I. Wilcoxen; Mobil Pipeline Company; Producers Gas Equities, Inc.; Warren E. Tomlinson; Gerold J. Kathol; Oread Oil Company, Inc.; Joe Hickman; Jones, Shelburne and Former, Inc.; Barton Oil Company; Charles W. Aikens, James W. Owens; Russel Cobb, Jr.; Lydea E. Kearns.
The additional parties plaintiff in the Federal Court asserting rights as heirs of testator but not parties to this petition are: Mar-

1. The order of the United States District Court for the District of Kansas, (at Topeka) entered on October 11, 1968, granting a stay of the pending case, *Shepard v. Hindman,* and the order entered July 3, 1968 denying summary judgment. (Rec. p. 15 and 8)

2. The order of the Kansas Supreme Court entered on 29 Jan. 1969 in *Hindman v. Shepard,* denying petitioner's Motion to Dismiss for Lack of Jurisdiction. (Rec. p. 29)

3. The judgment of the United States Court of Appeals for the Tenth Circuit entered on November 12, 1968, in *Morse v. The District Court of Rooks County, Kansas,* wherein the Circuit Court denied petitioner's application for a writ of Prohibition and/or Injunction to restrain the State Court from exercising IN REM Jurisdiction over real property in the exclusive jurisdiction of the Courts of the United States. (Rec. p. 30)

CITATIONS TO OPINIONS

The various orders and rulings of the United States District Court for the District of Kansas in *Shepard v. Hindman* are unreported but those relevant to this petition are set out in the Appendix hereto at Pages 21 to 29.

The order of the Kansas Supreme Court in *Hindman v. Shepard* is unreported but is set out in the Appendix hereto at Page 29.

The Judgment of the United States Court of Appeals for the Tenth Circuit in *Morse v. The District Court of Rooks*

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garet Christensen; Bernadine Scott; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Rhaecilla Hanzen; Catherine M. Ransom; Shirley Y. Hendersen; Anna Alley; Barbara Hillman; Elida Merritt; Laura Merritt; Francis Gfeller; and Myron Gfeller as Conservator of the Estate of Mary Catherine Shepard, deceased.

County, Kansas, will be reported but has not yet been published and is set out in the Appendix hereto at Page 30.

JURISDICTION

The judgments in the cases sought to be reviewed herein are as follows:

1. In the United States District Court for the District of Kansas in *Shepard v. Hindman.*

(a) On July 3, 1968, the Court entered an order denying petitioners Motion for Summary Judgment, which is not an appealable order (App. p. 8).

(b) On September 25, 1968, the Court entered an order denying a rehearing of an earlier motion for an injunction and was in effect an order denying an injunction against the State Court (App. p. 13).

(c) On October 11, 1968, the Court entered an "Order Granting Stay" of its proceedings and, in effect, enjoined petitioner (and co-plaintiffs) from further proceedings in Federal Court (App. p. 15).

Thereafter, on October 25, 1968, petitioner filed a $250.00 cash bond (Rec. p. 245) and Notice of Appeal (Rec. p. 242) to the Circuit Court seeking appellate review of those three orders; on November 4, 1968, request was made for a transcript (Rec. p. 246); on November 25, 1968, less than forty days from filing notice of appeal, the motion for additional time to docket record on appeal was filed and the order granting additional time, up to January 22, 1969, was filed by the Court the same day (App. 20); the Clerk of the District Court transmitted the certified copies of designated portions of the record to the Appellate Court on January 16, 1969, and the appeal, with the record, was docketed on January 22, 1969, in the United States Court of Appeals for the Tenth Circuit. (Rec. p. 1).

The jurisdiction of this Court is conferred by Title 28 U.S.C. Section 1254(1).

2. Petitioner docketed the appeal from the orders of the State District Court, in *Hindman v. Shepard,* in the Kansas Supreme Court on January 17, 1969, along with a "Motion to Dismiss for Lack of Jurisdiction" supported by certified copies of a "Record for Intermediate Hearing." (Records p. 1,023)

On January 29, 1969, the Kansas Supreme Court entered an order denying the motion without arguments (App. p. 29b) this order denying a motion to dismiss is sufficient evidence that the highest Court in the State of Kansas intends to exercise in REM jurisdiction over the disputed property. The jurisdiction of this Court to review by writ of certiorari the order of the state Court is conferred by Title 28 U.S.C. 1257(3).

3. The judgment of the United States Court of Appeals for the Tenth Circuit in *Morse v. The District Court of Rooks County, Kansas,* was entered on November 12, 1969, a rehearing was not requested and petitioner has until February 10, 1969, to docket a petition for certiorari review thereof.

The Jurisdiction of this Court is conferred by Title 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Can a State Court acquire jurisdiction over real property by the filing therein of a petition to quiet title by parties who have been served a summons and complaint by a United States Marshal and appeared as defendants in an in REM suit in ejectment involving the same property, filed in a United States District Court of concurrent jurisdiction, by parties who are named as defendants in the State Court proceedings.

2. Does Title 28 U.S.C. 2283 deny the courts of the United States the power to issue and enforce writs of prohibition and/or injunctions to restrain State Courts of concurrent jurisdiction from attempting to exercise IN REM jurisdiction over real property that is under the prior custody, control and jurisdiction of the courts of the United States.

3. Can the Courts of the United States, both District and Appellate, refuse to exercise the power conferred on them by Title 28 U.S.C. 1651 and deny an application for an injunction to restrain or prohibiting a state court from attempting to exercise in REM jurisdiction over real property in the exclusive and prior jurisdiction of the Courts of the United States.

4. Can the Courts of the United States with full and complete jurisdiction over all of the adverse claimants of record to described real property that is under its prior jurisdiction, custody, and control, after the issues have been made up, motions for summary judgment by both parties plaintiff and parties defendant have been submitted, argued and ruled on, then enter orders admitting purported findings and judgments, that are not final proceedings, from a suit before a State District Court, involving only part of the parties, and abate the proceedings before it with the announced intention of withholding exercise of its authority until the State Court rulings can be set up as res judicata.

5. Is the filing of a petition to quiet title in a State court by one who is a defendant and against parties plaintiff in a Federal Court suit in ejectment involving the same property the equivalent of malicious prosecution.

6. Does a warranty deed from a life-tenant and wife to a third party, executed in conjunction with and subject to

the terms of a separate contract which recognizes the fact that the grantor will bring suit against the remaindermen and specifies that if the suit clears the title then grantee will reconvey mineral interest in the property conveyed to the life-tenant, but, in the event the suit fails to clear the title then grantee will reconvey to grantors and grantors will reimburse grantee all money expended (1) create a mortgage on the property which the remaindermen can redeem after the death of the life-tenant and/or (2) create a champertous transaction which the remaindermen can vacate after the death of the life-tenant. (App. pp. 33 and 34)

7. Will summary judgment lie in favor of a party asserting legal title as beneficiary of a testementary trust with immediate rights of possession and against parties asserting an equitable title of bona-fide purchaser, laches, and estoppel under a chain of title originating with a life-tenant and supported by a judgment void on its face.

STATUTES INVOLVED

Constitution of the United States:

Article III. Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...

Article IV. Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . . .

Amendment V. No person shall be . . . . . deprived of life, liberty, or property, without due process of law; . . . .

Amendment XIV. Section 1 . . . . . No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Title 42 U.S.C. Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to not other.

Title 42 U.S.C. Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. Section 1985 (2). If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, ... or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any State or

Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . . .

Title 15 U.S.C. Section 77v. (a). The district courts of the United States, and the United States Courts of any territory, shall have jurisdiction of offenses and violations under this subchapter . . . . . and concurrent with State and Territorial courts of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter . . . . .

28 U.S.C. Section 1332 (a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between (1) Citizens of different states.

Title 28 U.S.C. Section 1343. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . . .

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . . .

Title 28 U.S.C. Section 2283. A court of the United States may not grant an injunction to stay proceedings in

a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28 U.S.C. Section 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law . . . . .

Title 28 U.S.C. Section 1254. Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case; before or after rendition of judgment or decree.

Title 28 U.S.C. Section 1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, *or where any title, right, or privilege or immunity is specially set up or claimed under the* Constitution, treaties, or *statutes of,* or commission held or authority exercised under, *the United States.*

Fed. Rule #60 (b) (4) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reason.

(4) The judgment is void . . . . . This rule does not limit the power of the court to entertain an independent

action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in section 60-309 or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill in review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RELEVANT STATE STATUTES

KSA 60-1001. Actions for possession; ejectment. (a) *Petition.* In any action to recover possession of real property, including an oil or gas lease or mineral interest, it shall be sufficient if the petition state that the petitioner has a legal or equitable interest therein and the right to possession.

(b) *Tenants in common.* In an action against a tenant in common the petition must state that the defendant either denied plaintiff's right, or did some act amounting to such denial . . . . .

KSA 33-106. No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person . . . . . or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing.

KSA 60-259. New trial, amendment of judgments: (a) Grounds. A new trial may be granted to all or any of the

parties on all or part of the issues when it appears that the rights of the party are substantially affected:

First. Because of abuse of discretion of the court, misconduct of the jury or party, or accident or surprise which ordinary prudence could not have guarded against, or for any other cause whereby the party was not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.

Second. Erroneous rulings or instructions of the court.

Third. That the verdict, report or decision was given under the influence of passion or prejudice.

Fourth. That the verdict, report or decision is in whole or in part contrary to the evidence.

On motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, and direct the entry of a new judgment.

(b) *Time for motion.* A motion for a new trial shall be served and filed not later than ten (10) days after the entry of the judgment except for good cause shown the judge may extend the time an additional twenty (20) days.

(f) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served and filed not later than ten (10) days after entry of the judgment . . . . .

STATEMENT OF THE CASE

Because each case relates to the other petitioner will first set out and identify each.

THE FEDERAL EJECTMENT CASE

The official style and title of this case is *Marvin J. Morse v. D. A. Hindman, et al, Case No. 20-69* in the United States Court of Appeals for the Tenth Circuit and is on appeal

from the United States District Court for the District of Kansas (at Topeka) where it was filed on March 3, 1966, as *Mary Catherine Shepard and Margaret Christensen, on behalf of themselves and all others similarly situated, v. D. A. Hindman; Charley A. Lynd; et al, Civil Action No. T-3987*

The jurisdiction of the Federal District Court was invoked because of diversity of citizenship, plaintiffs Catherine Shepard and Margaret Christensen being citizens of Oregon and Utah respectively and defendants being citizens of Kansas, Missouri, California, and one Texas corporation, and because the jurisdiction amount exists.

THE STATE QUIET TITLE CASE

The official style and title of this case is *D. A. Hindman and Charley A. Lynd v. Mary Catherine Shepard, et al, Case No. 45622,* in the Supreme Court of the State of Kansas and is on appeal from the District Court of Rooks County, Kansas, where it was filed on October 28, 1966, as *D. A. Hindman v. Mary Catherine Shepard, et al, No. 9873* and names therein all of the members of the class (heirs) as defendants. On March 8, 1967, an Answer and Cross Petition of Mary Catherine Shepard was filed and paragraph 44 therein alleges "That on February 3, 1966, defendants Mary Catherine Shepard and Margaret Christensen filed an action in Federal District Court, Topeka, Kansas, Case T-3987, claiming the fee simple title to all of this property against all known adverse claimants." (Rec. p. 1,047) on April 3, 1967, plaintiffs answered the cross claim and paragraph #40 therein states, "Plaintiffs admit the allegation of paragraph 44 that defendants Mary Catherine Shepard and Margaret Christensen on February 13, 1966, filed an action in Federal District Court in Topeka, Kansas, Case No. T-3987. All other allegations of said paragraph are denied. (Rec. p. 1,060)

Throughout the proceedings in state court petitioner made numerous objections to the courts jurisdiction and on January 3, 1969, filed a Motion to Vacate and Set Aside All Orders, Findings, Conclusions and Judgments and Motion to Dismiss for Lack of Jurisdiction. (Rec. p. 1,101) On January 13, 1969, oral arguments were heard and at that time petitioner introduced certified copies of the original petition (complaint) filed in the Federal Court on March 3, 1966; the Order Granting Stay by the court on October 11, 1968; Notice of Appeal filed on October 25, 1968; and the Order for Transmittal of Original Exhibit filed on December 2, 1968, and thereby judicially appraised the state court that the Federal Court proceedings were in rem, over the same property and between all of the parties in state court (Rec. p. 1,106 to p. 1,129).

On January 13, 1969, the district court overruled the motion to dismiss, (App. p. 28b). On January 15, 1969, the Notice of Appeal was filed (Rec. p. 1,104) and on January 17, 1969, a certified copy of a Record for Intermediate Hearing, including the certified Federal proceedings, along with a Motion to Dismiss for Lack of Jurisdiction was filed and the appeal docketed in the Supreme Court of the State of Kansas. (Rec. p. 1,023). The respondents filed a reply to the motion and on January 29, 1969, the court entered an Order Denying the Motion (App. p. 29b).

THE CIRCUIT COURT INJUNCTION CASE

The official style and title of this case is *Marvin J. Morse v. The District Court of Rooks County, Kansas, et al, No. 157-68,* in the United States Court of Appeals for the Tenth Circuit and was filed on November 5, 1968, (Rec. p. 578). No answers were filed and on November 12, 1968, the petition was denied. Jurisdiction was invoked under Title 28

U. S. C. A. Section 1651 with petitioner introducing approximately 400 pages of certified documents from the Federal ejectment case and approximately 120 pages of certified documents from the State quiet title proceedings and a showing that on October 25, 1968, petitioner had filed Notice of Appeal to said court from the district court and that its appellate jurisdiction was actual and not potential.

HISTORY OF THE CASE

In 1925, pursuant to paragraph sixth of his father's Will, George W. Atherton inherited a life estate in the disputed property and his children took a remainder estate vesting at the death of the testator. (Rec. p. 480).

On February 11, 1944, George W. Atherton and his wife, Hattie, purported to convey to Hattie's brother, Charley A. Lynd, title to the trust property. The deed was witnessed by attorney D. A. Hindman and duly recorded (App. p. 32). On February 23, 1944, Charley A. Lynd filed suit against the children of George W. Atherton, his brothers and sisters and all their spouses in *Charley A. Lynd v. Barbara Hillman D.C. Case No. 7807,* filed by D. A. Hindman pursuant to a contingent fee contract.

On April 7, 1944, while the case was still pending, George and Hattie Atherton, with Charley and Elida Lynd, reduced the terms of the conveyance into a written contract, executed by each of them. The contract acknowledged there is a suit to clear the title to the property and in the event the title is cleared then grantee will reconvey to grantors a 2/8 mineral interest but if the title is not cleared then grantees will reconvey to grantors and grantors will reimburse grantees all money expended. (App. p. 33).

The Will of testator was made a part of the petition to show the source of grantor's title, the petition alleges the

Will creates a fee-tail estate and that the deed executed by George and Hattie Atherton conveyed a fee simple title. A default judgment was entered finding that the Will created a fee-tail estate cut off by conveyance "and it so construed" and quieted title in plaintiff. (Rec. p 513 at 514). The day judgment was entered Charley A. Lynd purports to convey 2/8 mineral interest to D. A. Hindman, a 3/8 mineral interest to George and Hattie Atherton, as joint tenants, and retaining a 3/8 mineral interest in himself. (Rec. p 401 & 402).

In 1945 the Hindmans, Lynds and Athertons signed oil leases to Shell Oil Co., one covering the east ½ and another covering the west ½ of the property, these were the first mineral leases recorded on the title. (Rec. p. 403 & 404).

In 1950 George Atherton's brother, Orion, had signed two oil leases on the property described in paragraph fourth of testator's will, the second oil company had their lease ratified by all remaindermen and all parties named in the Will, a law suit resulted that was ruled on by the Kansas Supreme Court in *Wood River Oil Co. v. Madden, Case 169 Kan. 633,* wherein the court found that the will created a life-estate in the first taker with remainders vesting in the children of his body and that the spouse of a deceased vested remaindermen owned a share equal to the other remaindermen and for the purpose of this suit is the "law of the case".

Shell released their lease in 1950 and in 1951 the Hindmans, Lynds and Athertons leased to Jones, Shelburne and Farmer, Inc., again in two leases. The first well went into production on March 4, 1951 (Rec. p. 452) (this suit was filed March 3, 1951, less than 15 years later). Two producing wells were drilled on the east ½ and two dry holes on the west ½, in 1955 both producing wells were

plugged and the leases vacated and the next month Margaret Christensen recorded a mineral conveyance of ¾ of her rights in the property to her then husband, Ried Jewkes. (Rec. p. 419).

By April 12, 1959, the quiet title suit had been of record for 15 years and on November 24, 1959, the Hindmans, Lynds, and Athertons executed a lease to one Albert M. Austin (Rec. p. 30 and 31) who conveyed to Tomlinson-Kathol on March 8, 1960; on March 25, 1960 Margaret Christensen conveyed by Quit Claim Deed to her father, George W. Atherton, the deed and an affidavit showing the death of Ried Jewkes were recorded on the title on March 28, 1960, (Rec. p. 422) and on May 27, 1960, Tomlinson-Kathol went into production (Rec. p. 454). They have drilled seven wells on the property. Well #3 was a dry hole and was located on the east ½ of the property, the other six are producing wells and are located on the west ½ of the property (Rec. p. 452 to 464).

There are two pipelines across the property, Mobil Pipe Line Company purchases the oil and Producers Gas Equities provides natural gas to operate the lease, both leases are signed by Charley and Elida Lynd.

All other respondents herein acquired title by conveyance of mineral interests from or through Tomlinson-Kathol, except for the conveyance to Charles Aikens and J. W. Owens from Austin, as set out in petitioners amended complaint and in the abstract of title (Rec. p. 423 and 424).

On May 14, 1961, the life tenant, George W. Atherton, died testate and his wife, Hattie, was his only heir (Rec. p. 523). On December 25, 1964, Hattie Atherton died testate and her eight living daughters were her heirs (Rec. p. 570). Thus, any interest, either legal or equitable either owned in this property is now the property of the remain-

dermen along with immediate rights of possession of their remainder estate.

On March 3, a "petition" was filed in the Kansas Federal Court by two of the eight sisters asserting immediate rights of possession to described real property and showing that other parties were in possession under a conveyance from the life tenant and the date of his death, requesting that defendants be ejected, that a 1944 judgment purporting to make a judicial construction of the Will be held void for failing to name indispensable parties, that Lynd and Hindman be assessed exemplary damages for practicing fraud upon the court, for an accounting and other relief all within KSA 60-1001, statutory ejectment procedures. (Rec. p. 7).

The defendants set up an equitable defense claiming res judicata, laches, estoppel, bona fide purchaser, and adverse possession. (Rec. p. 17 at p. 21 and p. 24 at p. 28)

On October 21, the Court entered a ruling headed "Special Issue of Class Action Sufficiency" and granted plaintiffs ten days to amend the complaint for themselves individually (App. p. 1).

On October 28, 1966, defendants Hindman and Lynd filed a suit in the State District Court to quiet title to the property naming all of the remaindermen (Rec. p. 1,047).

On April 27, 1967, and March 8, 1968, plaintiffs filed motions to enjoin the state court proceedings which were denied (Rec. p. 48 and 146), and on September 6, 1968, the state court entered judgment for Hindman and Lynd.

On September 9, 1968, the Federal Court admitted the findings and judgments of the state court and denied a motion for rehearing of a motion to enjoin the state court and filed the order on September 25, 1968 (App. p. 13).

On October 11, 1968, the Federal Court abated its proceedings (App. p. 15) and on October 25, 1968, petitioner filed notice of appeal. (Rec. p. 242)

On November 5, 1968, petitioner filed suit in the United States Court of Appeals for the Tenth Circuit asking for an injunction against the State Court that was denied on November 12, 1968 (App. p. 30).

On January 13, 1969, the State Court denied a motion to dismiss (App. p. 29); on January 19, 1969, on appeal for intermediate ruling, the Supreme Court of Kansas denied a motion to dismiss.

Petitioner was substituted into the action as transferee of Mary Catherine Shepard after her death and, on hearing of motion, was granted permission to file an amended complaint, to introduce newly discovered evidence, being the contract to reconvey and on June 14, 1968, when petitioners' motion for summary judgment was heard every person of record claiming adversely to plaintiffs had been served with summons and complaint and appeared by counsel and all of the heirs of testator had been joined by order of the court and either served with summons and complaint or entered an appearance and any decision herein will be a final determination of the rights of all adverse claimants. (Docket sheets rec. p. 367).

That the deed and contract signed by the Lynds and George and Hattie Atherton created a mortgage, even though both parties may have been mistaken as to their respective rights (see *Wiswell v. Simmons,* 77 Kan 622, 95 P 407.)

That all parties who can claim an interest in real property are indispensable parties in a suit to construe a Will is the subject of many Kansas decisions (see *McFadden v. McFaddin* 179 Kan 455).

That the recording of a deed by the grantee is notice to all the world that he is claiming title thereunder is the purpose of the recording statutes, thus Margaret's deed to her husband, then to her father, and the recording thereof was notice that the remaindermen were still asserting rights to the property.

REASONS FOR GRANTING THE WRIT

Petitioner has exhausted both Federal and State Court remedies, all adverse claimants are before the Court and petitioner has no other redress.

Sections 1 and 2 of Article III of the Constitution of the United States and the Acts of Congress passed in pursuance thereto, give citizens of one state the right to bring and maintain a suit in the Federal Court in another state. A citizen who would exercise that right in an in rem proceeding in ejectment is compelled to bring his suit in the Federal Court in the state where the property is situated and where the defendant lives.

The reason for the grant to him by the Constitution of this right to have the decision of his controversy with the citizen of another state by a Federal Court was thereby to avoid the local attachments and prejudices in favor of the defendant that those who made the Constitution feared might injuriously affect the administrations of justice in the state courts against the claims of citizens of other states.

In the exercise of that constitutional right petitioner has invoked the jurisdiction and persistently demanded an adjudication of an in rem controversy and an enforcement of the jurisdiction by the Federal Court that had first acquired jurisdiction over the property.

The same judicial power which grants to a non-resident a Federal right to sue a citizen in a Federal Court operates upon the citizen who is sued and compels him to yield to the exercise by another of that Federal right. The existence of a right to sue in one logically and constitutionally imposes upon the other the obligation to be sued. If the person to be sued can, by any act of his, defeat the Federal right to sue, then the latters rights, though created by the

Constitution, the Supreme law of the law, may be wholly annulled by the caprice or whim of a local citizen.

The Federal obligation to be sued cannot be destroyed or thrown off by an evasive resort to a State Court by the defendant in the Federal Court, after the Federal Court has, by appropriate procedure, acquired jurisdiction, custody and control of the property, the parties and the subject matter, and to permit such a situation to develop would utterly destroy the Federal Constitutional Judicial Power and the non-residents Constitutional rights, and would thereby, to that extent amend our Constitution and the Federal Courts could decide questions offered by non-residents only *by consent of the defendants.*

If the defendants are permitted to prosecute the State Court suit over the objections of petitioner then it would be established that a citizen of a state may remove an in rem suit from Federal Court to State Court.

The acts of the Federal District Court in refusing to issue the injunctions when requested and then abating the proceedings; of the Circuit Court in denying the injunction against the State court; and of the State Court continuing to exercise jurisdiction, over real property after being judicially appraised that the property is in the jurisdiction, custody and control of the Federal Court, are in such direct conflict with the mandates of this Court in the decisions below as to require the Supreme Courts supervisory powers.

In *Toucey v. New York Life Insurance Company* 314 US 118 on page 135 . . . The rank and authority of the (Federal and State) courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict . . .

And in *Penn Co. v. Pennsylvania 294 US 189* on page 196 . . . But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of a bill is treated in constructive possession of the property, and as authorized to proceed with the case . . .

In *Covel v. Heyman* 111 US 182 . . . The forebearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principal of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States it is something more. It is a principal of right and law, and therefore a necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that RES is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the Court from which it issues.

(and on page 183) . . . The principal which defines the boundaries of jurisdiction between the judicial tribunals of the States and of the United States, the application of which effectually prevents their confusion, was set forth and vindicated in the judgment of this court in *Ableman v.*

Booth, 21 How. 506. It was said by Chief Justice Teney, P 506, that "The sphere of action appropriate to the United States is as far beyond the reach of the judicial process issued by a State judge or a State Court as if the line of division was traced by landmarks and monuments visible to the eye." And speaking of the procedure in cases of HABEAS CORPUS, issued under State authority, and admitting the duty of the officer of the United States, holding the prisoner under its process, to return the fact and show his warrant, the Chief Justice continues, "But after the return is made and the State judge or Court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion of another government, and that neither the writ of HABEAS CORPUS nor any other process issued under State authority can pass over the line of division between the two sovereignities" . . .

. . . And the exclusive authority of the court issuing the writ extends, not only to the decision of all questions affecting its jurisdiction, and the form and force of the writ itself, and the validity of the proceeding in issuing and executing it, but also of all questions affecting the identity of the person or property seized and held under color of its authority and the right to exempt them from its operation.

In *McClellan v. Carlan* 217 US 268, last sentence:

. . . It cannot be denied that a Circuit Court of the United States, like other Courts, had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the state court, by its action involving all the parties, might render a judgment which would be

RES JUDICATA, and thus prevent further proceedings in Federal Court.

. . . In the present case, so far as the record before the Circuit Court of Appeals discloses, the circuit court of the United States had acquired jurisdiction, the issues were made up, and when the State intervened the Federal Court practically turned the case over for determination by the State Court. We think it had no authority to do this, and that the Circuit Court of Appeals upon the record before it, should have issued the writ of mandamus to require the judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case.

It follows that if the State Court does not have jurisdiction of the real property in a quiet title suit it can enter no lawful order whatsoever, and petitioner is immune to the State Court proceedings under the Constitution and laws of the United States.

CONCLUSION

Petitioner suggests that if the relief prayed for be not granted that any United States citizen may henceforth be denied the protection of his rights under the United States Constitution and Federal law, by the simple device of the defendants counter-suing in State Court.

For the foregoing reason, this petition for writ of certiorari should be granted.

Respectfully submitted,

Marvin J. Morse
Pro Se Petitioner

Appendix A

In the United States District Court
for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, and MARGARET CHRISTENSEN, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

D. A. HINDMAN; CHARLEY LYND, et al.,
Defendants.

RULING ON SPECIAL ISSUE OF CLASS ACTION

Plaintiffs Shepard and Christensen, two of eight surviving children and heirs at law of George W. Atherton, now deceased, brought this action in this Court against defendants Hindman, Lynd and owners of leasehold and mineral interests in certain described real estate in Rooks County, Kansas.

The two plaintiffs are non-residents of Kansas and diversity of citizenship appears to exist between them and the named defendants. The problem here arises because plaintiffs allege in their complaint that the action is maintained as a Class Action on behalf of themselves and six of their sisters, all of whom, they allege, are remaindermen entitled to the real estate described in the complaint by virtue of the provisions of the Will of their grandfather, James E. Atherton, deceased.

It appears that three of the remaindermen are residents of Kansas and defendants contend that the effort to maintain this as a Class Action is for the purpose of circum-

venting the jurisdiction of the state court and to use such device as a subterfuge for obtaining federal jurisdiction in this court.

Initially the Court determines that less than all tenants in common in real estate, situated in Kansas, may maintain against third parties an action in ejectment, or forceable entry and detainer or to establish his or her undivided interest in the real estate. *Holt v. King,* 250 F.2d 671.

The defendants Hindman and Lynd and some of the owners of leasehold or mineral interests raise the special defense that

> "some of the persons alleged in the complaint to be members of the class plaintiffs claim to represent, are citizens of the State of Kansas. This action is not truly or properly a class action; the complainants are not too numerous and it is not impracticable for them to join as plaintiffs in an action against the defendants; nor can the present plaintiffs fairly insure adequate representation of the non-party complainants. This action is cast as a class action for the purpose of wrongfully and improperly conferring jurisdiction on the United States District Court."

The proposition must be considered under the applicable provisions of Rule 23 which was amended, effective July 1, 1966. The Court believes that the issue must be determined from a consideration of paragraph (a) of the rule which reads:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

It appears from the record that there are only eight contingent remaindermen who could have claims against the real estate which is the subject of the action here. All are known, their places of abode are known. While it is asserted in the complaint that it is impracticable to bring them into court, there is no allegation of fact from which such a determination can be made, nor does the record establish such fact.

Rule 23 requires that one or more members of a class may sue as a representative party *only* if the class is so numerous that joinder of all the members is impracticable. While it may be conceded that there are questions of law or fact common to the class, and the claims of the representative parties are typical of the claims of the class, (though this is denied) and the representative parties could fairly and adequately protect the interests of the class, the plaintiffs do not allege, nor does it affirmatively appear, that "the class is so numerous" that joinder of all members is impractical. Plaintiffs contend that multiplicity of actions may be avoided by permitting the maintenance of this as a class action because other remaindermen would have to file separate actions in the place of residence of each, and that this would therefore be impractical. This contention cannot be sustained because the action to recover an interest in real estate, as here, is in the jurisdiction where the property is located. Actions in other jurisdictions would not be maintainable. See authorities cited and rule stated in 36 C.J.S. p. 133 Title Federal Courts, Section 25(1).

It is said that the size of the group sufficient to justify a class action is relative according to the situation as it exists and is a matter of judicial discretion. *Rank v. Krug*, 90 F.Supp. 773, 804.

The sufficiency of numbers in a class considered adequate to sustain a Class Action has been considered by this Court. In *Coffman v. City of Wichita,* 165 F.Supp. 765, opinion adopted by Tenth Circuit Court of Appeals, 261 F.2d 112, where it appeared that the owners of seven of eighteen tracts involved in the class joined on behalf of themselves and of the group, each of which were the owners of separate tracts of property to obtain a declaratory judgment as to the validity of certain eminent domain proceedings. The Court in its opinion said:

> "Assuming, without deciding, that there are common questions of law and fact, there is one requirement which all of the above types of classes must meet. That is, that the number involved in the class must be 'so numerous as to make it impracticable to bring them all before the Court. . .' Rule 23, F.R.C.P.28 U.S.C. There are eighteen tracts involved in this group, the owners of seven of which have joined individually. Under the facts of this case, it is concluded that this is not a spurious class action in which the parties are so numerous as to render it impracticable to have them before this Court."

The Court is aware that under the amended rule the categories of class actions have been eliminated but the application of the rule in respect to the requirement that the number involved in a class must be so numerous as to make it impracticable to bring them all before the Court has not been modified in any respect.

This rule announced is consistent with that in the case of *Jackman v. Union Pacific,* 4 F.R.D. 172, where it was said:

> "The plaintiff is able to name each of the seven other heirs of the decedent. There is no reason why

> these interested parties should not be brought into court and made parties plaintiff. The plaintiff is not confronted with an impracticable situation. It was not the design of the rule to permit class actions as the facts are presented here. Moreover, there is no averment or an assignment of a reason why all the heirs are not made parties plaintiff."

The special defense that the members of the class are not sufficiently numerous to support the maintenance of this action as a class action is well taken. The Court cannot under the circumstances say that the class is so numerous that the joinder of all the members is impracticable, particularly when plaintiffs may individually prosecute this action for the protection or recovery of their alleged interests or rights in the real estate involved.

Plaintiffs have requested that in the event this defense is sustained that they be permitted to amend their petition (complaint) so as to maintain this action for themselves individually. This request is granted and leave is given to so amend the complaint, labeled as a petition, within ten days.

It is so ordered.

Dated at Topeka, Kansas this 21st day of October, 1966.

/s/ GEORGE TEMPLAR

United States District Judge

Filed Oct. 21, 1966

In the United States District Court
for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, and MARGARET CHRISTENSEN, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

D. A. HINDMAN; CHARLEY LYND, et al.,
Defendants.

ORDER DENYING INJUNCTION TO STAY PROCEEDINGS

The plaintiff, Margaret Christensen, filed a motion in this Court on April 27, 1967 requesting the Court for an order pursuant to 28 U.S.C. 2283 enjoining any and all further proceedings in the cause captioned D. A. Hindman and Charley Lynd v. Mary Catherine Shepard, et al, No. 9,873 now pending in the District Court of Rooks County, Kansas until such time as this cause shall have been determined and concluded and the plaintiff's rights fully adjudicated. Plaintiff Christensen alleges in support of her motion that this action was filed and service obtained upon defendants herein prior to the filing by them of the action in the District Court of Rooks County, Kansas, which cause involves issues and subject matter in common with this cause.

Counsel for the interested parties have filed well prepared briefs supporting their respective contentions with respectable authorities cited.

The action pending here is brought to recover money damages against certain of the defendants and at the same

time to obtain a determination that certain conveyances and a quieting title judgment rendered by a state court be held void as a basis for the action to recover money damages, and it is further maintained for the purpose of enjoining defendants from extracting minerals from the premises described and to eject them from the same and for the further purpose of having plaintiff's title quieted to the property involved.

In a brief filed on their behalf, some defendants suggest a better solution to the problem of concurrent jurisdiction of the matters and issues involved between the parties here would be to stay proceedings in this Court. The Court is attracted by the suggestion but cannot sustain it.

After reviewing the file, the briefs and considering the arguments and statements of counsel, the Court is of the view that at most, this Court must exercise its discretion in ruling upon the motion to stay proceedings in state court, and though some duplication of effort may arise if the motion is denied, this Court should, taking into account the applicable law, the federal statutes controlling, and all of the facts and circumstances, at this time deny and overrule the motion.

It is so ordered.

Dated at Topeka, Kansas this 31st day of July, 1967.

/s/ GEORGE TEMPLAR

United States District Judge

Filed July 31, 1967

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action is being maintained by Marvin J. Morse and others to determine and establish their interest in certain real estate located in Rooks County, Kansas, and described as:

> All that portion of Section 32 lying sough of the Union Pacific Railroad right-of-way in Township 9 south, Range 19 west of the 6th P.M., consisting of 333 acres, more or less.

This property was subject to a devise under the will of James E. Atherton, deceased, which was admitted to probate on August 4, 1925. By its terms, the will gave the property in question to George W. Atherton "to be held by him and for his use during his natural lifetime, provided he pay the taxes as they become due and payable on the same. . . . After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above-described real estate shall descend to the children of his body and that the same be held by them and for their

use for a period of twenty years from the time of the death of the said George W. Atherton, after which the said children of my son George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

Another provision of the will stated in substance that, "Should any one of my children (naming them) after coming into possession of the use of their respective lands, refuse to pay the taxes on the same . . . it is my will and I hereby direct (that he) . . . shall be deprived of any benefit whatever under this will and that the proceeds of the property which shall go to such offending person shall go to the other of my said children upon the payment of the taxes."

It appears that sometime after the death of James E. Atherton, his son George W. Atherton had taken possession of the real estate so devised to him, and that he had not been able to pay the taxes on the land. It further appears that he made a deal of some kind, the full details of which have not been completely established but which resulted in a deed being given to one Charley A. Lynd by George W. and Hattie Atherton, his wife, on February 11, 1944. The property was redeemed from tax foreclosure by Lynd and he thereafter instituted an action to quiet the title to the property so conveyed. Plaintiffs attack the effectiveness of this quiet title action, contending the judgment is completely void because certain indispensable parties were not joined in the action. After Judgment was rendered in this action (No. 7807) quieting title in Charley A. Lynd, on April 12, 1944, Charley A. Lynd conveyed to D. A. Hindman, a one-fourth interest in the oil and gas under the property and a three-eighths interest of the oil and gas to George and Hattie Atherton, his wife.

Thereafter, several events took place which are not of significance here, but about November 24, 1959, D. A. Hindman and wife, Charley A. Lynd and wife, and George W. Atherton and wife, executed oil and gas leases to one Albert A. Austin, the predecessor in title to holders or present leasehold interests in the property. Production of mineral was established and continues to be produced under these leases.

Several other interests have been created by conveyances from Lynd granting easements to pipeline companies, which companies are parties to this action.

Plaintiff, Marvin J. Morse, now presents to the Court his motion for summary judgment on the grounds that no genuine issue as to any material fact exists and that plaintiff is entitled to a judgment as a matter of law.

There are numerous defendants in this case, consisting of, among others, Charley A. Lynd, D. A. Hindman, the oil and gas lessees, mortgagees, holders of pipeline easements, and other parties claiming an interest by virtue of the oil and gas leases mentioned above.

Basically, various defendants contend:

(1) That the quiet title action in 1944 (Case No. 7807), maintained by Charley A. Lynd, barred plaintiffs from any interest in the property;

(2) That the statute of limitation bars plaintiffs' claims;

(3) That defendants are bona fide purchasers without notice of any claims, and that plaintiffs must be estopped to assert any interest in the property.

There are likely other issues to which the Court has not had its attention called, but plaintiffs' theory appears to be that a contingent remainder existed in them or their ancestor which has never been extinguished and which gives them an unfettered interest in the property which they now

endeavor to establish and from which they seek to exclude defendants. Other contentions seem possible, but generally speaking, this is the background of the case.

In considering motions for summary judgment, the Court must bear in mind the rules applicable. Where a party moves for summary judgment, he has the burden of establishing the lack of any material triable issue of fact by the record before the Court even though the opposing party would at trial have the burden of proof on the particular issue. Summary judgment is only appropriate where the case is so free from doubt as to render a formal trial useless. Inferences that may be drawn from all the facts before the Court should be viewed in a light favorable to the party opposing the motion. *Bolack v. Underwood,* 340 F.2d 816, (10 CA).

Furthermore, this Court was admonished in the case of Shehi v. Southwestern Bell Telephone Company, 382 F.2d 627, that summary judgment precludes an original finding of fact or the establishment of permissible inferences from undisputed facts and must flow only as a matter of law from undisputed facts. It is enough to say that the grant of summary judgment is improper where a case presents genuine issues as to material facts which the Court cannot say are free from doubt. *Morrow v. Spiess,* 349 F.2d 931, (10 CA); and see the case of *U.S.A. v. Cook,* T-3792, 4-13-66, unreported.

This Court cannot say from the disputed facts before it that the quieting title judgment is totally void; that the statute of limitation has run; that plaintiffs have remaindermen's interest in the property which they are entitled to preserve and eject defendants from any interests therein; nor can the Court say that as a matter of law defendant

oil and gas lessees were not purchasers for value, in good faith, without notice. These issues are not so free from doubt that the Court may say plaintiffs are entitled to judgment as a matter of law.

Plaintiff, in his motion for summary judgment, requests that if summary judgment is not rendered in his favor upon the whole case, or for all the relief asked, and a trial is necessary, that the Court, at the hearing on the motion by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually, and in good faith, controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action as are just.

The Court must rule that plaintiff's motion for summary judgment should be denied. Plaintiff's suggestion that the Court define the issues that may remain and ascertain what material facts are in good faith controverted are matters that should be properly taken up before the Court under F.R.Civ.P., 16, which sets forth the pretrial procedure designed to accomplish the purpose suggested by plaintiff in his motion for summary judgment. At pretrial, these matters will be considered as the rule authorizes.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that plaintiff's motion for summary judgment filed on June 3, 1968, (Doc. 165), be, and the same is hereby, denied and overruled.

Dated at Topeka, Kansas, this 3rd day of July, 1968.

/s/ GEORGE QEMPLAN
United States District Judge

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER

On this 9th day of September, 1968, this matter came on for hearing before the Court,

First, upon the motion of plaintiff, Marvin J. Morse, to vacate the order of this Court entered March 8, 1968, refusing to enjoin the parties from proceeding in an action then pending before the Rooks County, Kansas District Court;

Second, upon the motion of defendants, D. A. Hindman and Charley A. Lynd, to stay proceedings in this Court pending the outcome of the action in the Rooks County, Kansas District Court.

Thereupon, the Court, after hearing arguments and statements of counsel and upon being fully advised in the premises, finds that plaintiff's motion to vacate and set aside the order of this Court entered March 8, 1968, should be denied.

It is so ordered.

Thereupon, the Court considered the motion of defendants, Hindman and Lynd, to stay further proceedings between the parties in this Court, and the Court, after fully considering the evidence submitted and the arguments and

statements of the parties and the counsel, finds that such motion should be taken under advisement, that defendants should be granted ten days to file a brief in support of their motion, and that plaintiff should be granted ten days' time thereafter within which to file reply briefs.

It is so ordered.

/s/ GEORGE TEMPLAR
United States District Judge

Filed September 25, 1968

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER GRANTING STAY

This action was first initiated in this Court when plaintiffs Mary Catherine Shepard and Margaret Christensen filed on March 3, 1966, a class action on behalf of themselves and other remaindermen under the provisions of the will of James E. Atherton, deceased, as a class. The action was brought to establish the rights of plaintiffs in described real estate in Rooks County, Kansas; to set aside deeds conveying interest in the property to defendants Hindman and George W. Atherton and Charley Lynd; declaring a quiet title judgment rendered in case number 7807 by Rooks County, Kansas District Court to be void; setting aside deed from Margaret Christensen to George W. Atherton; and praying money damages, actual and punitive, against defendants Lynd and Hindman; and also praying ejectment of oil and gas lessees and others claiming an interest in the property.

Defendants challenge the right of plaintiffs to maintain the suit as a class action and the Court on October 21, 1966, sustained defendants' special defense that members of the class were not sufficiently numerous to support the maintenance of a class action, but the Court, at that time, granted leave to plaintiffs to file an amended complaint

for themselves individually. On November 1, 1966, an amended complaint was filed by the same plaintiffs, as individuals, seeking substantially the same relief originally prayed for.

In the meantime, defendants Hindman and Lynd had instituted an action in the District Court of Rooks County, Kansas against Mary Catherine Shepard and other persons claiming an interest in the same real property. The determination of the rights and interests of the respective parties in that real estate is the basis of plaintiffs' suit in this Court. On plaintiffs' application, numerous holders of mineral interests in the land were made defendants in this Court and demands for an accounting were sought from each of such defendants, together with a prayer that they be excluded from any interest in the property about which the litigation is involved.

This Court has denied applications of plaintiffs to enjoin defendants from proceeding with the quiet title action in the Rooks County State Court. During the pendency of this action, plaintiff Mary Catherine Shepard died, and the action has been revived in the names of her successors in interest.

The case was placed on the September 9, 1968 Pre-Trial Calendar of the Court, and prior to that time, plaintiffs on September 3, 1968, filed a motion again seeking to enjoin defendants Hindman and Lynd from proceeding in the state court with the action they had instituted there and requesting this Court to vacate the order it had entered denying an injunction to enjoin parties from proceeding with the action in the state court. This motion the Court denied.

On September 4, 1968, defendants filed a motion to stay proceedings in this Court and offered in support of the motion a certified copy of a judgment supported by duly

certified copies of Findings of Fact and Conclusions of Law entered by the District Court of Rooks County, Kansas on September 3, 1968, purporting to quiet the title of the defendants here against the plaintiffs to the described real estate, the subject of the litigation before this Court.

The Court heard this motion on September 9, 1968, and received in evidence certified copies of the Findings and Conclusions and the Judgment entered September 3, 1968 by the Rooks County State Court.

It appears from the evidence submitted that the state court did render a judgment as claimed by Hindman and Lynd quieting their title to the land against plaintiffs here and that the judgment is final. The adjudication of the state court of the issue of ownership in the real estate here involved is determinative of the rights of all the parties to that property. It was said in the case of *Mandeville v. Cantebury*, 318 U.S. 47, 49:

> "But where the judgment sought is strictly in personam for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other."

Again, in *Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17 (2nd Cir.), that court set forth the applicable rules as follows, p. 19:

> "The well established rule is that a federal court is not required to abate the normal in personam action on a plea of a pending action in a state court. . . . Had this case been initiated as a civil action rather than by arbitration, it would have been a simple contract action, with none of the in rem characteristics which required the application of a different rule in such

> cases. . . . In such cases, it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings."

And, in *Princess Lida v. Thompson,* 305 U.S. 456, the following principle was stated:

> "Where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."
>
> "But if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other."

This principle was sustained in the Tenth Circuit by the case of *Brinkley v. Hassig, et al.,* 83 F.2d 351.

There is another aspect of the case to which reference should be made. A judgment rendered by a state court of competent jurisdiction is entitled to full faith and credit in all federal courts and bars an action in a federal court on the same cause between the same parties. A state court judgment, operating as a merger and extinguishment of the original claim or demand, will bar an action in a federal court on the same cause of action between the same parties or their privies. If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. The judgment of the state court will be conclusive as to all points and questions actually put in issue and decided in the action in the state court. See 50 C.J.S., *Judgments,* § 900, and at § 899 of the same treatise, we find the general statement of applicable law that the principle of res judicata is applied as between

federal and state courts; and where suits on the same cause of action are pending simultaneously in a state court and in a federal court, a final judgment entered in either court will be binding and conclusive in the other, regardless of which suit was first commenced.

Presumably the judgment rendered by the Rooks County District Court, excluding plaintiffs here from any interest in the property involved, is a valid and enforceable judgment. If it is not vacated or reversed, the causes of action in the federal and state courts being substantially the same, the judgment will be conclusive on all points and questions actually put in issue and decided in the action in the state court as between the parties and their privies. See cases cited in 50 C.J.S., *Judgments,* § 900, p. 522.

One of the plaintiffs, Marvin J. Morse, has announced to this Court that a new trial is being sought from the judgment rendered against him and the other plaintiffs by the Rooks County State Court, and if the motion is overruled, that an appeal will be taken by them to the Kansas Supreme Court. Under such circumstances, it is the view of this Court that a stay of further proceedings should be granted as requested by defendants Hindman and Lynd until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case. Thereafter, the Court will consider any further proceeding required by the facts and circumstances as they then appear.

It is by the Court so ordered.

Dated at Topeka, Kansas, this 11th day of October, 1968.

/s/ GEORGE TEMPLAR

United States District Judge

Filed Oct. 11, 1968

Appendix

In the United States District Court for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, CHARLEY A. LYND, et al.,
Defendants.

ORDER EXTENDING TIME WITHIN WHICH TO DOCKET RECORD ON APPEAL

Now, on this 25th day of November, 1968, for good cause shown, it is by the Court

Ordered that the time in which record on appeal in above cause may be docketed in the United States Court of Appeals, Tenth Circuit, be and the same is hereby extended until and including January 22, 1969.

/s/ GEORGE TEMPLAR
Judge

Filed Nov. 25, 1968

Appendix B

In the District Court of Rooks County, Kansas

No. 9873

CHARLEY A. LYND and D. A. HINDMAN,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendant.

OPINION

At the pretrial conference in this matter some of the defendants made a request for a jury. To this request the plaintiffs and one defendant objected.

The suit was filed as a quiet title action by plaintiffs. Defendants now seek to quiet title in themselves and seek damages for having been deprived of possession.

No claim could be made for the right of trial by jury except on the damages.

Able briefs have been furnished to the Court by plaintiffs and Mr. Frank Sabatini for some of the defendants.

The Court finds that this case is not a jury matter. The defendants, by filing a cross petition, asking for a money judgment, did not change the nature of plaintiffs' cause of action.

Dated this 8th day of April, 1968.

/s/ C. E. BINLY
District Judge

Filed Apr. 8 1968

In the District Court of Rooks County, Kansas

Case No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, BARBARA HILLMAN, FRANCES GFELLER, MARGARET CHRISTENSEN, ANNA ALLEY, LAURA MERRITT, ELIDA MERRITT and BERNADINE SCOTT,
Defendants.

JUDGMENT

Judgment is hereby entered in accordance with the Court's Memorandum Opinion, Findings of Fact and Conclusions of Law made and entered in this action and filed by the Clerk of the Court under date of August 5, 1968. In accordance therewith:

General judgment is entered in favor of the plaintiffs and against the defendants and each of them.

The cross-petitions and complaints of each of the defendants are denied.

The title of the plaintiff Charley A. Lynd to the ownership of the entire surface estate and an undivided 3/8ths interest in the minerals and mineral estate in the following described land:

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way,

is hereby quieted against the claims of the defendants and each of them, their heirs, successors and assigns, or any parties claiming under them.

The title of the plaintiff D. A. Hindman to the ownership of an undivided ¼th interest in the minerals and mineral estate in and under the above described land is also quieted against the claims of the defendants and each of them, their heirs, successors and assigns, or any parties claiming under them.

The defendants and each of them are hereby restrained and enjoined from claiming, asserting or setting up any right, title, interest or estate in and to the real estate hereinabove described which is inconsistent with the terms of this judgment and the right, title and estate hereby quieted in the plaintiffs Lynd and Hindman, respectively, provided that the defendants Barbara Hiliman, Frances Gfeller, Margaret Christensen, Anna Alley, Laura Merritt, Elida Merritt, Bernadine Scott and Catherine Marie Ransom, Harold Alfred Morse, Ralph Leland Morse, Donald Edward Morse, Marvin James Morse, Mrs. Esther Rhaecilla Hanzen and Mrs. Shirley Yvonne Henderson are recognized to be the owners collectively of an undivided ⅜ths mineral interest for a period of twenty (20) years commencing April 12, 1944, and as long thereafter as oil and/or gas is produced from these premises or the property is being developed or operated.

The costs of this action are taxed to the defendants.

It is so ordered.

The Findings of Fact and Conclusions of Law of the Court are hereby made a part of this Journal Entry.

C. E. Birney
Judge

Filed Sept. 3rd, 1968
Irma Renner
Clerk

In the District Court of Rooks County, Kansas

No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendants.

JOURNAL ENTRY

Now to-wit on this 3rd day of September, 1968, the same being the first day of the regular September, 1968 term of said Court, and court being in due and legal session, plaintiffs appearing by Stanley Krysl of Stockton, Kansas, one of their attorneys of record, and plaintiff, D. A. Hindman also appearing in person, and no other parties appearing, matters pending herein before the Court, came regular on for hearing.

Thereupon the motion of defendant, Marvin J. Morse, to amend the Court's Memorandum Opinion and Findings of Fact, was considered by the Court.

Thereupon the Court announced that it had studied this motion in advance of this hearing.

Thereupon the Court finds and decrees that said motion should be, and the same is overruled.

Thereupon, the Journal Entry of Judgment, prepared by counsel for plaintiffs, was submitted to the court, together with evidence in the form of letters advising that Frank Sabatini, attorney for some of the defendants, had declined to approve said Journal Entry because the Court's Findings of Fact and Conclusions of Law were not included, and that a copy of said Journal Entry had been mailed to Marvin J. Morse, under date of August 12, 1968, by plaintiffs'

counsel with letter advising that if he had any objections to the form thereof to file said objections within ten (10) days from said date.

Thereupon said Journal Entry was considered by the Court.

Thereupon the Court finds and decrees that no objections had been filed by Marvin J. Morse and that said Journal Entry should be approved by the court, subject that the following be added at the end thereof, viz: "The Findings of Fact and Conclusions of Law of the Court are hereby made a part of this Journal Entry."

Filed Sept. 5, 1968

Thereupon the aforesaid language was added to said Journal Entry and the same was approved by the Court and signed by the Judge thereof, and filed with the Clerk.

Judge

In the District Court of Rooks County, Kansas

No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendants.

JOURNAL ENTRY
(Overruling Motion for New Trial)

Now to-wit on this 4th day of October, 1968, the same being an adjourned day of the regular September, 1968 term of said court, and one of the regular designated motion and court days thereof, the motion of Marvin J. Morse for a new trial came regular on for hearing; plaintiffs appearing by their attorney, Stanley Krysl of Stockton, Kansas, and plaintiff, D. A. Hindman, also appearing in person, and no other parties appearing.

Thereupon, said motion was presented to the Court by the attorney for plaintiffs.

Thereupon, the Court announced that it had studied said motion in advance and was prepared to rule thereon.

Thereupon the Court finds that said motion should be overruled.

It is therefore by the Court considered and ordered that said motion be, and the same is overruled.

Judge

O.K. Stanley Krysl,
Attorney for Plaintiffs
Filed Oct. 14 1968

[Title of Court and Cause omitted]

ORDER FOR ALLOWING EXTENSION OF TIME IN WHICH TO PREPARE TRANSCRIPT

Now on this 6th day of December, 1968, the Court orders that the time in which the Official Reporter of this Court shall prepare and complete that transcript requested by counsel for certain of the appellants on or about the 7th day of October, 1968, be extended for thirty (30) days from December 8, 1968, to and including January 7, 1969.

It Is So Ordered.

/s/ C. E. Birney
C. E. Birney, District Judge

In the District Court of Rooks County, Kansas

No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendants.

JOURNAL ENTRY

Now to-wit on this 13th day of January, 1969, the same being an adjourned day of the regular January, 1969 term of said court, and one of the regular designated motion days thereof, plaintiffs appearing by one of their attorneys of record, Stanley Krysl of Stockton, Kansas, plaintiff, D. A. Hindman appearing in person, and defendant, Marvin Morse, also known as Marvin James Morse and Marvin J. Morse, appearing in person and representing himself, and no other parties appearing, the above entitled matter came regularly on for further proceedings.

Thereupon, Defendant Marvin James Morse presented his motions to vacate and set aside all orders, findings, conclusions and judgments and motion to dismiss for lack of jurisdiction.

Thereupon, said motions were orally argued by the parties present and the court being fully advised in the premises, and after due consideration, finds that said motions to vacate and set aside all orders, findings, conclusions and judgments and motion to dismiss for lack of jurisdiction should be overruled.

It is so ordered by the Court.

s/C. E. BIRNEY
C. E. Birney
Judge

Approved s/ Stanley Krysl,
Stanley Krysl
Stockton, Kansas
Attorneys for Plaintiff.

s/ Marvin J. Morse
980 Barkley Ct.
Pinole, California
Pro-Se Defendant

In the Supreme Court of the State of Kansas

No. 45,622

D. A. HINDMAN AND CHARLEY A. LYND,
Appellees,

vs.

MARY CATHERINE SHEPARD, et al.,
Appellants.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant to dismiss for lack of jurisdiction.
Motion by Appellant to dismiss appeal, DENIED.

Yours very truly,

JAMES R. JAMES
Clerk, Supreme Court

Date January 29, 1969

Appendix C

September Term, November 12, 1968.

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

Marvin J. Morse, *Petitioner,* vs. The District Court of Rooks County, Kansas; The Honorable C. E. Birney, Judge of the Thirty-Fourth Judicial District of Kansas and presiding judge of The District Court of Rooks County Kansas; D. A. Hindman and wife Pauline; Charley A. Lynd and wife Elida; Margaret Christensen; Bernadine Scott; Anna Alley; Barbara Hillman; Elida Merritt; Laura Merritt; Francis Gfeller; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Rhaecilla Hanzen; Catherine M. Ransom; Shirley Y. Henderson, Attorneys Tom Triplett and Robert Martin; Stanley Krysl; Frank Sabatini; Joel Sterrett and Lawrence Munns, *Respondents.*	No. 157-68

By his application for a writ of prohibition and, in the alternative, an injunction, the petitioner seeks to stay proceedings in a Kansas state court. A suit was brought in the federal court apparently involving some of the parties to the state suit and some, or all, of the issues. The federal court refused to stay the state court proceedings and denied a motion for summary judgment.

Section 2283, 28 U.S.C., says that a federal court may stay state court proceedings when necessary in aid of its

jurisdiction or to protect its judgments. Here the federal district court has determined that the injunction is not needed in aid of its jurisdiction. We find nothing in the papers to show that in so acting the district court abused its discretion. That court has entered no judgment which must be protected.

The application for a writ of prohibition and for an injunction are severally denied.

A true copy

Teste

William L. Whittaker
Clerk, U.S. Court of
Appeals, Tenth Circuit

[Seal]

/s/ Helen R. Bartha
Deputy Clerk

Appendix D

DEED SPECIAL WARRANTY

THIS INDENTURE, Made this 11th day of February, A.D. 1944 between George W. Atherton and Hattie Atherton, his wife, of Wallace County, in the State of Kansas of the first part, and Charley A. Lynd of Trego County, in the State of Kansas of the second part:

WITNESSETH, That said parties of the first part, in consideration of the sum of ($1.00) One and No/100 DOLLARS, and other consideration to them in hand paid by said party of the second part, before the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all of the following-described real estate, lying and situate in the County of Brooks, and State of Kansas, to wit:

> All that part of Section Thirty-two (32), lying South of the Union Pacific Railroad Right-of-way in Township Nine (9) South, Range Nineteen (19), West, consisting of 333 acres, more or less

$3.00
(Revenue Stamps attached)

TO HAVE AND TO HOLD THE SAME, Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, unto the said party of the second part, his heirs and assigns forever: And the said Parties of the First Part for themselves, their heirs, executors and administrators, do hereby covenant, promise and agree, to and with the said party of the second part, that at the delivery of these

presents they are lawfully seized of said interest of and in all and singular the above-granted and described premises, with the appurtenances, and said interest in and to the same, unto the said party of the second part, his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same and shall and will warrant, and by these presents, forever defend.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands the day and year first above written

George W. Atherton
Hattie Atherton

.....

.....

WITNESS:

D A Hindman
Notary Public
Term expires 4/26/47

Filed Feb 11, 1944 and recorded in Book 52 Page 270
Mable L. Stewart, Register of Deeds.

CONTRACT

This Agreement Is Made By and Between George W. Atherton and Hattie A. Atherton, his wife and Charley A. Lynd and Elida Lynd, his wife, the first named being hereinafter referred to as first parties and the second named being hereinafter refered to as second parties.

Witnesseth; Whereas, First Parties have executed and delivered to Charley A. Lynd a deed covering the following described property located in Rooks County, Kansas, to-wit:

All that part of Section Thirty-Two (32), lying South of the Union Pacific Railroad Right-of-way in Town-

ship Nine (9) South, Range Nineteen (19), West, consisting of 333 acres, more or less,

and

Whereas, a suit is now pending in the District Court or Rooks County, Kansas, to clear the title to said property.

Now Therefore, as a part of the consideration for said deed second parties agree, in the event said title is cleared in said action, to convey to first parties an undivided 3/8ths interest of the oil, gas and mineral rights in and to the above described property for a period of Twenty-(20) years, and as long thereafter as oil and/or gas is produced from said premises.

The above described Royalty or Mineral conveyance shall be delivered to first parties immediately after the completion of said suit, and shall provide that said interest shall be conveyed to First Parties and the survivor thereof.

In the event said property is not cleared in said action second parties are to reconvey said property to First parties and they are to re-pay the said Charley A. Lynd all money that he has advanced or paid in connection with said property, and in addition thereto first parties are to divide any Oil or Gas that they receeive from said property if it is possible for them to do so, with said Charley A. Lynd.

In Witness Whereof, said parties have hereunto subscribed their names this 7th day of April 1944.

/s/ George W. Atherton

/s/ Hattie A. Lynd Atherton

First Parties

/s/ Charley A. Lynd

/s/ Elida Lynd

Second Parties